



February 13, 2002

Ms. Janice Mullenix
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2002-0692

Dear Ms. Mullenix:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 158547.

The Texas Department of Transportation (the “department”) received a request for “all records relating to the American Association of Motor Vehicles [Administrators] (AAMVA) Special Task Force on Identification Security.” You claim that the requested information is excepted from disclosure under sections 552.111 and 552.137 of the Government Code. You also indicate that the release of some of the requested information may implicate the proprietary rights of third parties, including Fall Hill Associates, L.L.C., Biometric Security Card, Inc., Datacard Group, SafeCard ID System, Datastrip, Inc., ICAO New Technologies Working Group, The IdentiScan Company, L.L.C., Intelli-Check, Inc., Ronald O’Connor, and Infiniti-e Mobile Data Solutions. Accordingly, you notified these third parties of the instant request pursuant to section 552.305 of the Government Code. We have considered all of the submitted arguments and reviewed the submitted information.

We first address your contention that a portion of the submitted information is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 provides that “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency is excepted from [required public disclosure].” This section encompasses the deliberative process privilege. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000). The deliberative process privilege, as incorporated into the Act by section 552.111, protects from disclosure interagency and intra-agency communications consisting of advice, opinion, or recommendations on policymaking matters of a governmental body. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 615 at 5 (1993). An agency’s policymaking functions do not encompass internal administrative or personnel matters; disclosure of

information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, the deliberative process privilege does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.--Austin 2001, no pet.); ORD 615 at 4-5.

It appears that the AAMVA is a private association of individuals involved in licensing drivers and automobiles. You state that the department is a part of the AAMVA's Special Task Force on Identification Security (the "task force"). You further state that the department "has worked with employees of other governmental agencies on the task force to generate preliminary and in some cases second drafts of detailed reports summarizing the underlying theory and initial results" of the task force's study regarding identification security. You contend that these preliminary and secondary reports are excepted under section 552.111 and the deliberative process privilege because they consist of communications with other governmental bodies on a matter of policy. However, while the communications involve some representatives of other governmental bodies, the communications have also been shared with private individuals serving on a task force of a private organization. Therefore, the information you seek to withhold under section 552.111 does not consist of inter- and intra-agency communications and may not be withheld under section 552.111 and the deliberative process privilege. *See* Open Records Decision Nos. 561 at 9 (1990), 474 at 2-3 (1987).

Next, we address whether the information in Exhibit C is excepted from disclosure. While you notified several third parties that the release of the information in Exhibit C could implicate their proprietary rights, we have not received any arguments from Fall Hill Associates, L.L.C., Biometric Security Card, Inc., SafeCard ID System, Datastrip, Inc., ICAO New Technologies Working Group, The IdentiScan Company, L.L.C., Intelli-Check, Inc., Ronald O'Connor, and Infinite Mobile Data Solutions. Consequently, none of these third parties has provided a reason for withholding their information. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990).

On the other hand, this office has received arguments from Datacard Group. Datacard Group contends that a portion of its information is excepted from public disclosure under section 552.110(a) of the Government Code. Section 552.110(a) excepts from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).¹ This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

Datacard Group contends that certain information describing their methods for increasing identification card security consists of trade secrets. Datacard supports this argument with a discussion of each of the six trade secret factors as they apply to the information in question. Based on Datacard Group's arguments and our review of the information, we agree that the information Datacard Group seeks to withhold as trade secrets is excepted from disclosure under section 552.110(a). We have marked this information, which the department must withhold.

¹The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

With respect to the remainder of the submitted information, we address your argument under section 552.137 of the Government Code. Section 552.137 provides that “[a]n e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Public Information Act].”² We have marked a sample of the types of e-mail addresses in the submitted information that are subject to section 552.137. The department must withhold these types of e-mail addresses in the submitted information unless the relevant individuals have affirmatively consented to their release.

We also note that the submitted information contains a social security number. Social security numbers may be withheld in some circumstances under section 552.101 of the Government Code. A social security number or “related record” may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security number in the file is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing the social security number, you should ensure that it was not obtained or is not maintained by the department pursuant to any provision of law, enacted on or after October 1, 1990.

In summary, the department must withhold the Datacard Group information that we have marked under section 552.110(a) of the Government Code. The department must also withhold the types of e-mail addresses that we have marked under section 552.137 of the Government Code. The department must withhold the social security number contained in the submitted information under section 552.101 in conjunction with the federal Social Security Act if the department obtained or maintains the number pursuant to a provision of law enacted on or after October 1, 1990. The department must release the remainder of the submitted information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the

²An identical exception has been added as section 552.136 of the Government Code.

governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/sdk

Ref: ID# 158547

Enc: Submitted documents

c: Mr. Chris Hoofnagle
Legislative Counsel
Electronic Privacy Information Center
1718 Connecticut Avenue NW, Suite 200
Washington, DC 20009
(w/o enclosures)

Ms. Andrea Hageman Snook
General Counsel
Datacard Group
11111 Bren Road West
Minnetonka, Minnesota 55343-9015
(w/o enclosures)

Mr. Barry J. Kefauver
Principal
Fall Hill Associates
3315 Fall Hill Avenue
Fredericksburg, Virginia 22401
(w/o enclosures)

Mr. William E. Bardwell
President
Biometric Security Card
28870 U.S. Highway 19 North, Suite 335
Clearwater, Florida 33761
(w/o enclosures)

Mr. Yoram Curial
SafeCard ID System
4801 East Independence Boulevard, Suite 705
Charlotte, North Carolina 28212
(w/o enclosures)

Mr. Ronald O'Connor
175 Mount Vernon Street
West Newton, Massachusetts 02465
(w/o enclosures)

Mr. William Cawfield
Sales Director, State & Local Government
Datastrip
1000 Heritage Center Circle
Round Rock, Texas 78664
(w/o enclosures)

Mr. David Philp
RFI Coordinator
ICAO New Technologies Working Group
c/o New Zealand Post Office
Identity Services
Department of Internal Affairs
47 Boulcott Street
Wellington, New Zealand
(w/o enclosures)

Mr. Peter DiMaria
President
The IdentiScan Company
420 Somers Road
Ellington, Connecticut 06029
(w/o enclosures)

Mr. Geoffrey G. Slagle
Vice President–Jurisdiction Document Systems
Intelli-Check
246 Crossways Park West
Woodbury, New York 11797-2015
(w/o enclosures)

Infinit-e Mobile Data Solutions
25/F IBM Plaza, Eastwood Cyberpark
E. Rodriguez Jr. Avenue
Bagumbayan, Quezon City 1110
Phillipines
(w/o enclosures)